Supreme Court, U.S.
FILED
MAY 14 1998
OFFICE OF THE CLERK

(5)

No. 97-1147

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, PETITIONER

v.

WAYNE THOMAS CARTER

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

35 pp

QUESTIONS PRESENTED

1. Whether a person whose sole connection to an apartment is that he packaged drugs there as an invitee of its lessee for about two and one half hours has a reasonable expectation of privacy in the apartment that permits him to claim the protection of the Fourth Amendment.

2. Whether a police officer's observation of the interior of an apartment from a grassy common area immediately outside the apartment, through gaps in the apartment's venetian blinds, constitutes a "search" within the meaning of the Fourth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
The officer's observation of respondents in the apartment in which they were packaging drugs did not violate their Fourth Amendment rights	10
I. Short-term invitees do not have a legitimate expectation of privacy in the homes of others	10
A. Reasonable expectations of privacy in a place require more than a brief or limited association with that place	11
B. Society does not recognize the privacy expectations of invitees other than overnight guests as legitimate	16
C. Respondents were mere invitees with no reasonable expectation of privacy in the premises	19
II. Unaided observation of a dwelling from a common area open to the public is not a "search" within the meaning of the Fourth Amendment	21
A. Unaided observation from a public or common area is not a search	22
B. "Extraordinary measures" to reach a public place do not convert unaided observation into a search	26
Conclusion	30

TABLE OF AUTHORITIES

Cases: Page

Alderman v. *United States*, 394 U.S. 165 (1969) .. 10, 11
Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 24
California v. *Ciraolo*, 476 U.S. 207 (1986) 9, 22, 23, 25, 26, 28, 29
California v. *Greenwood*, 486 U.S. 35 (1988) 24, 26
Chapman v. *United States*, 365 U.S. 610 (1961) 14
Florida v. *Riley*, 488 U.S. 445 (1989) 22, 23, 25, 26, 28, 29
Hester v. *United States*, 265 U.S. 57 (1924) 23-24
Horton v. *California*, 496 U.S. 128 (1990) 28-29
Johnson v. *United States*, 333 U.S. 10 (1948) 14
Jones v. *United States*, 362 U.S. 257 (1960) 8, 12, 14, 15, 16, 19
Katz v. *United States*, 389 U.S. 347 (1967) 11, 12, 13, 22
McDonald v. *United States*, 335 U.S. 451 (1948) 14
Minnesota v. *Olson*, 495 U.S. 91 (1990) 4, 8, 11, 14, 15, 16, 17, 19
Oliver v. *United States*, 466 U.S. 170 (1984) 9, 22, 23
Payton v. *New York*, 445 U.S. 573 (1980) 22
Rakas v. *Illinois*, 439 U.S. 128 (1978) 4, 8, 11, 12, 13, 14, 18, 20
Rawlings v. *Kentucky*, 448 U.S. 98 (1980) 18
Stoner v. *California*, 376 U.S. 483 (1964) 8, 13, 14, 16
Terry v. *Martin*, 120 F.3d 661 (7th Cir. 1997) 18
Texas v. *Brown*, 460 U.S. 730 (1983) 29
United States v. *Acosta*, 965 F.2d 1248 (3d Cir. 1992) 27
United States v. *Concepcion*, 942 F.2d 1170 (7th Cir. 1991) 27
United States v. *Cruz-Pagan*, 537 F.2d 554 (1st Cir. 1976) 27

Cases—Continued: Page

United States v. *Dunn*, 480 U.S. 294 (1987) 9, 23, 24, 25, 26, 27, 28, 29
United States v. *Eisler*, 567 F.2d 814 (8th Cir. 1978) 27
United States v. *Fields*, 113 F.3d 313 (2d Cir.), cert. denied, 118 S. Ct. 434 (1997) 27
United States v. *Grandstaff*, 813 F.3d 1353 (9th Cir. 1987) 17
United States v. *Hicks*, 978 F.2d 722 (D.C. Cir. 1992) 18
United States v. *Jacobsen*, 466 U.S. 109 (1984) 27
United States v. *Jeffers*, 342 U.S. 48 (1951) 14
United States v. *Maddox*, 944 F.2d 1223 (6th Cir. 1991) 17
United States v. *McNeal*, 955 F.2d 1067 (6th Cir. 1992) 17
United States v. *Nohara*, 3 F.3d 1239 (9th Cir. 1993) 27
United States v. *Padilla*, 508 U.S. 77 (1993) 19, 21
United States v. *Payner*, 447 U.S. 727 (1980) 12
United States v. *Van Leeuwen*, 397 U.S. 249 (1970) 13
United States v. *Wiley*, 847 F.2d 480 (8th Cir. 1988) 18

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
Minn. Stat. § 609.746 (1996) 24
Minn. Stat. Ann. (West 1989):
subdiv. 1(1) 2
subdiv. 2(1) 2
§ 609.05 2

Miscellaneous:

Webster's New International Dictionary of the English Language (2d ed. Unabridged 1958) 2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1147

STATE OF MINNESOTA, PETITIONER

v.

WAYNE THOMAS CARTER

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents two questions: First, whether a person who has no connection to an apartment other than having used it, for approximately two and one half hours, to package illegal narcotics as an invitee of the lessee, has a legitimate expectation of privacy in the apartment within the meaning of the Fourth Amendment; and second, whether it is a Fourth Amendment "search" for a law enforcement officer to observe narcotics activities within an apartment from a grassy, common area immediately outside the apartment's window. The United States has a law enforcement interest in the resolution of both questions.

STATEMENT

After trial in Minnesota District Court for the County of Dakota, respondents Wayne Thomas Carter and Melvin Johns were convicted of conspiracy to possess cocaine with intent to sell it and aiding and abetting the possession of cocaine, in violation of Minn. Stat. Ann. §§ 152.021, subdiv. 1(1), 152.021, subdiv. 2(1), and 609.05 (West 1989). The Minnesota Court of Appeals affirmed the convictions, and the Supreme Court of the State of Minnesota reversed.

1. At approximately 8 p.m. on May 15, 1994, Officer Jim Thielen was approached by an individual who said that he had been walking by the window of an apartment nearby and had seen several people bagging white powder inside. J.A. A8, E1-E2, G7-G9. The individual also stated that a blue, four-door Cadillac, with Illinois license plate number SGD-896, was being used by the apartment's occupants. J.A. A8, E2, G9-G10.

Thielen went to the apartment that the individual had described. Although the venetian blinds covering the windows were drawn, there were gaps in the blinds, and the lights inside the apartment were on. J.A. A9, E2, G12-G13, I6, I9-I10.[1] Thielen left the common sidewalk and walked across a grassy area, which was common to all tenants in the apartment complex, to a point about 12 to 18 inches from the window. J.A. E2, E10. From that location, Thielen could see the

[1] A venetian blind is a "blind (capable of being raised or lowered) having numerous thin parallel slats placed horizontally one above another which are capable of being set simultaneously at any desired angle to admit varying amounts of light or air, or of being made to overlap one another to exclude light, etc." *Webster's New International Dictionary of the English Language* 2827 (2d ed. Unabridged 1958).

occupants of the apartment through the gaps in the blinds. J.A. A9, E2, E10, E13, G12-G13. Thielen spent about 15 minutes watching as respondents and a woman, who was later identified as Kimberly Thompson (the apartment's only lessee), sat at a kitchen table and bagged what appeared to be narcotics. J.A. A9, E2-E3, G13-G14.[2]

Thielen then left to meet with the individual who had told him about respondents' activities and to arrange for a search warrant. Before the warrant was obtained, however, another police officer saw respondents get into the Cadillac the informant had described. The police stopped the car and asked respondents to get out; the officers then saw, in plain view on the floor of the car, a black zippered pouch and a handgun. After respondents were arrested, the police obtained a search warrant and searched both the car and the zippered case; they found (among other things) scales, pagers, and 40 grams of a white mixture containing cocaine. J.A. A9, E3, E12, G15-G23.

2. Before trial, respondents moved to suppress evidence on the ground that Thielen's initial observation of the apartment was an unlawful search. The Minnesota District Court for Dakota County denied the motion. J.A. E1-E17.

First, the court concluded that respondents lacked "standing" because they had no "legitimate expectation of privacy" in the apartment. J.A. E7-E8. Rely-

[2] Respondent Carter was measuring out small quantities of a white powder and passing them to respondent Johns. Johns, who was wearing bedroom slippers, would in turn put the powder in a plastic bag and pass it to Thompson. Thompson would then cut off the ends of the bag and put it on a pile on the kitchen table. J.A. A9, E2, G13-G14.

ing on this Court's decisions in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and *Minnesota* v. *Olson*, 495 U.S. 91 (1990), the court acknowledged that an individual may have a legitimate expectation of privacy in the home of another. J.A. E7-E8. In *Olson*, the trial court noted, this Court held that an overnight guest has a legitimate expectation of privacy in his host's home. Here, however, respondents presented no evidence that their status "in Ms. Thompson's apartment was similar to Olson or that [their] status was one that was envisioned to be protected under the *Olson* rationale." J.A. E8. "No evidence was presented at the hearing" that respondents "had lived at this apartment long term, w[ere] overnight guest[s], or w[ere] related to the leaseholder." J.A. E7. Instead, "[t]he only evidence presented showed" that respondents were residents of another city and that they "had been at the apartment for a period of a few hours on May 15, 1994, during the police observation." *Ibid.* "Without more evidence," the court explained, it could not "conclude that [respondents'] expectation of privacy in the apartment was based upon 'understandings that are recognized and permitted by society,' and therefore legitimate." J.A. E8.

The court also concluded that, even setting aside respondents' lack of a protected privacy interest in the apartment, Thielen's observations did not constitute a search within the meaning of the Fourth Amendment because they "were made from a common area opened to the public and other occupants of the apartment complex" and "were limited to articles in plain sight" through "gaps in the blinds." J.A. E9. Although the grassy area from which Thielen made his observations was 12 to 18 inches from the window, the court explained, it did not constitute "curtilage"

of the apartment but rather was "common to all residents" of the apartment building. J.A. E10. There were no fences, trees, or bushes that might block public entry into the area where Thielen stood, or otherwise prevent public viewing through the window. *Ibid.* To the contrary, the photographic exhibits showed that "the public had access to the area directly in front of Ms. Thompson's windows to store bicycles," and would "leave the common sidewalk * * * to deposit their bicycles" near the area where Thielen stood. *Ibid*; see J.A. I2, I4. Because Thielen was standing in a common area, open to the public, rather than in the curtilage, the court concluded that "the officer's observations did not constitute a search." J.A. E12.

3. Respondents appealed, and separate panels of the Minnesota Court of Appeals affirmed. As to Carter, the appellate court agreed with the trial court that he lacked the legitimate expectation of privacy in the apartment required to support a Fourth Amendment challenge. J.A. C4-C6. As to Johns, the court found no need to address "standing," because it concluded that Thielen's observations did not violate the Fourth Amendment since they were made from a common area open to the public. J.A. D3-D5.

4. Respondents appealed and the Minnesota Supreme Court reversed. The court first resolved Carter's appeal, J.A. A1-A28, and then relied on its reasoning to reverse the judgment in Johns' case, J.A. B1.

a. In reversing Carter's conviction, the court stated that whether an individual has a legitimate expectation of privacy to support a Fourth Amendment claim depends on "the nature of the relationship between the property possessor and the person

alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing." J.A. A18. In this case, the court concluded, the facts "probably fail to establish" that Carter was Thompson's "guest" in the apartment. J.A. A17. But, the court concluded, society would still respect as reasonable Carter's expectation of privacy. *Ibid.* The court explained that Carter was on the premises with the leaseholder's permission; that he remained there for two and one half hours working on a joint task; and that society recognizes as "valuable" the right of property owners or leaseholders to engage in joint tasks with guests, "be it legal or illegal activity." J.A. A17-A18. Thus, "[a]lthough society does not recognize as valuable the task of bagging cocaine," the court found Carter's presence in the apartment to be within the zone of Fourth Amendment protection. J.A. A18.

b. The court then held that Thielen's observations of the activities in the apartment violated the Fourth Amendment. The question, the court stated, "is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where they were[;] * * * rather it is the area that was observed." J.A. A19-A20. The court noted, without resolving the issue, that it was "plausible" that Thielen had legitimately positioned himself outside the apartment in a common area and had not invaded the apartment's curtilage. J.A. A20 & n.10. But it nevertheless concluded that, "even if * * * the area just outside the window was a common area," Thielen violated the Constitution because he had used "extraordinary measures to enable him to view the inside of the apartment." J.A. A22.

Explaining its finding of "extraordinary measures," the court noted that Thielen made his observations after he had left the sidewalk, walked across the grass, crossed over or by some bushes, placed his face within 12 to 18 inches of the window, and looked through a gap between the blinds. J.A. A22. Viewing the inside of a private dwelling through such "extraordinary measures," the court held, "constitute[s] a search under the Fourth Amendment." *Ibid.*

c. Three Justices dissented. J.A. A24-A28. They contended that prior decisions had held that a "transient visitor" has no legitimate expectation of privacy when he is simply "present on the property of another only to use the telephone or bathroom, was merely a party guest, or otherwise failed to establish a connection to the property beyond simply being present at the time of the search." J.A. A25-A26 (footnotes omitted). In this case, the dissent concluded, Carter had not shown an expectation of privacy that society would consider reasonable, because he established only that he was present in the apartment for two and one half hours for the purpose of conducting illegal activity. He did not show that he had ever been to the apartment before; that he had any prior relationship with the lessee; that he had any personal effects in the apartment; that he had a key to the apartment; or that he could invite other persons to, or exclude them from, the apartment. J.A. A27.

SUMMARY OF ARGUMENT

I. Temporary visitors to another person's apartment lack the legitimate expectation of privacy in the apartment that the Fourth Amendment requires to support a claim of an illegal search. The constitutional test is whether the visitor has an expectation

of privacy that society recognizes as reasonable. This Court has rejected the view that a sufficient expectation of privacy arises simply because a person is "legitimately on premises where a search occurs." *Rakas* v. *Illinois*, 439 U.S. 128, 141 (1978). Rather, the Court has required a more substantial or extended connection to another person's property. See, *e.g.*, *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel guest); *Jones* v. *United States*, 362 U.S. 257 (1960) (guest with dominion and control over friend's apartment).

In *Minnesota* v. *Olson*, 495 U.S. 91 (1990), the Court found that such a legitimate expectation of privacy exists for an overnight guest in another person's private home. In evaluating the social expectations of houseguests, the Court observed that the need for a secure place to sleep is universal; that the host's home functions as a substitute domicile; that the overnight guest is likely to have a measure of control over the host's premises; and that hosts are likely to respect and act to protect the privacy interests of their overnight guests during their stay. The factors identified in *Olson* are absent in the case of a person making a brief social or business visit to another person's apartment.

Unlike an overnight guest, a temporary visitor generally has no expectation of control over his own privacy in another's dwelling. Nor do such visitors ordinarily use another person's apartment for the private and personal activities associated with the home. To recognize a privacy interest on behalf of such a transient visitor would come close to reviving the "legitimately on premises" test that this Court has already rejected. Accordingly, temporary visitors, such as respondents, cannot claim the legitimate

expectation of privacy that is needed to object to a search of their host's home.

II. Even if respondents could claim the protection of the Fourth Amendment, there was no search in this case. The Fourth Amendment permits officers to view with the unaided eye what is visible to any member of the public. That principle applies even if the officer trespasses on private property to look inside a dwelling (so long as he does not intrude on its curtilage). See, *e.g.*, *United States* v. *Dunn*, 480 U.S. 294 (1987); *Oliver* v. *United States*, 466 U.S. 170 (1984). It similarly applies if an officer views protected areas of a home from an overflight in an airplane or helicopter, since such a view is similar to what public air travelers could see. See, *e.g.*, *California* v. *Ciraolo*, 476 U.S. 207 (1986).

In this case, an officer was told by a private citizen that the citizen had observed suspicious activity in the apartment while passing by. The officer then went to the apartment, walked over a grassy common area to a point about one foot from the apartment's window, and looked through a gap in the blinds to observe respondents packaging drugs. The same view could have been seen by another tenant parking a bicycle; by a child chasing a ball; by a gardener trimming the bushes; or by a curious passerby. Nothing in the Fourth Amendment prohibited the officer from making the same observations that any member of the public could have made.

ARGUMENT

THE OFFICER'S OBSERVATION OF RESPONDENTS IN THE APARTMENT IN WHICH THEY WERE PACKAGING DRUGS DID NOT VIOLATE THEIR FOURTH AMENDMENT RIGHTS

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas* v. *Illinois*, 439 U.S. 128, 130 n.1 (1978). To meet that burden, respondents must make two showings. First, they must show that they had a legitimate expectation of privacy, protected by the Fourth Amendment, in the apartment in which they were evening visitors for the purpose of packaging drugs. Second, they must show that the officer's observations of the activities within the apartment constituted a Fourth Amendment search. Contrary to the decision of the Minnesota Supreme Court, respondents can make neither showing.

I. SHORT-TERM INVITEES DO NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE HOMES OF OTHERS

As this Court has explained, Fourth Amendment rights "are personal" and "may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134 (emphasis added). Respondents were not observed while in their own apartment, or in any other location in which they had a property interest.

As a result, they must claim an expectation of privacy in the apartment of another person who had invited them in for a few hours to engage in the joint activity of packaging drugs. While this Court has held that an overnight guest has a protected expectation of privacy, see *Minnesota* v. *Olson*, 495 U.S. 91 (1990), respondents' brief and limited relationship to the apartment in which they were observed did not afford them a "legitimate expectation of privacy" in that place, *Rakas*, 439 U.S. at 143, and they therefore cannot show a violation of their own Fourth Amendment rights.

A. Reasonable Expectations Of Privacy In A Place Require More Than A Brief Or Limited Association With That Place

An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143. An expectation of privacy in a particular place is "legitimate" only if it is one that "that society is prepared to recognize as 'reasonable.'" *Id.* at 143 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Because application of the exclusionary rule to respond to a Fourth Amendment violation impedes "the search for truth at trial" by depriving the trier of fact of "relevant and reliable evidence," "misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations." *Rakas*, 438 U.S. at 137-138; see *Alderman*, 394 U.S. at 175 ("additional benefits of extending the exclusionary rule to other defendants" does not "justify fur-

ther encroachment upon" the strong interest of having "those accused of crime * * * acquitted or convicted on the basis of all the evidence which exposes the truth"); see also *United States* v. *Payner*, 447 U.S. 727, 734 (1980) (over-expansive use of the exclusionary rule can "impede unacceptably the truth-finding function of judge and jury").

A protected expectation of privacy must come from a source external to the Fourth Amendment, such as "concepts of real or personal property law" or shared "understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12. Here, respondents do not claim a property interest in Ms. Thompson's apartment. As a result, their claim to Fourth Amendment protection must find support, if at all, in generally shared social understandings and expectations about privacy interests. *Ibid.*; *Katz*, 389 U.S. at 352-353.

This Court has rejected the view that society respects the privacy interests of "anyone legitimately on premises where a search occurs." *Rakas*, 439 U.S. at 141 (quoting *Jones* v. *United States*, 362 U.S. 257, 267 (1960)). As the Court explained, such a standard is "too broad a gauge for measurement of Fourth Amendment rights." 439 U.S. at 142.

> [A]pplied literally, [the "legitimately on premises" standard] would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to the search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose to permit either of them to object to the lawfulness of the search.

Ibid. Under *Rakas*, therefore, when an individual's association with a place is only brief and limited, he lacks a socially recognized interest in maintaining the privacy of that place. To support such a privacy interest, an individual must show a deeper or more lasting attachment, *i.e.*, he must show that he falls within a social tradition that respects that person's interest in solitude and in preventing unwanted intrusions.

In *Katz* v. *United States*, 389 U.S. at 352, this Court held that an individual has a legitimate expectation that his telephone conversations, made from an enclosed phone booth, will remain private: "One who occupies [an enclosed telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." The Court's holding reflected a social understanding and custom that members of society generally share—the assumption that personal conversations made from a phone booth are, like private letters dropped into the mail, see *United States* v. *Van Leeuwen*, 397 U.S. 249, 251 (1970), matters that individuals may ordinarily expect to remain private.

Similar considerations have led the Court to conclude that an individual has a legitimate expectation of privacy in his hotel room, much as he would in his own home. See, *e.g.*, *Stoner* v. *California*, 376 U.S.

483 (1964); *United States* v. *Jeffers*, 342 U.S. 48 (1951). A hotel guest's expectation of privacy is limited by the fact that he "gives 'implied or express permission'" for "'maids, janitors, * * * repairmen'" and the like "to enter his room 'in the performance of their duties.'" *Stoner*, 376 U.S. at 489 (quoting *Jeffers*, 342 U.S. at 51). Nonetheless, a hotel room functions in many respects as the guest's substitute "home," that is, as a refuge for the conduct of his most private and intimate affairs. Consequently, hotelier, guest, and society all share the common understanding that the guest's seclusion in his hotel room is entitled to great solicitude. For comparable reasons, the Court's cases repeatedly have recognized the legitimacy of privacy expectations in other temporary residences. *Ibid.*; see also *McDonald* v. *United States*, 335 U.S. 451 (1948) (tenant in a rooming house); *Chapman* v. *United States*, 365 U.S. 610 (1961) (renter of residential unit); *Johnson* v. *United States*, 333 U.S. 10 (1948) (hotel room).

Most recently, in *Minnesota* v. *Olson*, 495 U.S. 91 (1990), this Court applied a similar analysis to conclude that an overnight social guest has a legitimate expectation of privacy in his host's home. Before *Olson*, the Court had decided, in *Jones* v. *United States*, 362 U.S. 257 (1960), that a defendant who had a key to his friend's apartment, left and entered as he pleased, kept personal belongings in the apartment, had slept there, 362 U.S. at 259, and exercised "complete dominion and control over the apartment" including the authority to "exclude others from it," had a legitimate expectation of privacy there. *Rakas*, 439 U.S. at 149; see *Olson*, 495 U.S. at 98 ("[W]hile his host was away, [the petitioner in *Jones*] had complete dominion and control over the apartment and could

exclude others from it."). In *Olson*, this Court extended that holding to all overnight guests, finding that the "untrammeled power" or legal right "to admit and exclude" exercised by the defendant in *Jones* was not "essential to Fourth Amendment protection." 495 U.S. at 99.

To reach that conclusion, the Court considered whether the overnight guest's relationship to the host's dwelling creates an interest in privacy that society, by custom and tradition, treats with solicitude and respect. For the overnight guest, the Court explained, the host's home functions as a substitute domicile, a refuge "where he and his possessions will not be disturbed." 495 U.S. at 99. Overnight guests seek shelter in their host's home—just as they might seek shelter in a hotel room—precisely because they need a secure, private location:

> We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.

Ibid.

Because of that universal need for security, the host, the guest, and society treat the overnight guest as having a privacy interest in the home, even though he has no legal right to exclude others and remains solely at his host's sufferance. "[W]hen the host is away or asleep, the guest," not unlike the homeowner's children, "will have a measure of control over the premises." *Olson*, 495 U.S. at 99. More important, even though the host has the legal right to

"admit or exclude from the house as he prefers," it is "unlikely that he will admit someone who wants to see or meet the guest over the objection of the guest." *Ibid.* And although "few houseguests will invite others to visit them" without consulting their hosts, the hosts by social custom "will often be accommodating." *Ibid.* As the Court summarized, "[t]he point is that hosts will more likely than not respect the privacy interests of their guests * * * despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Ibid.* *Olson* thus makes clear that social understandings can create a protected privacy interest in another person's home, but only when they reflect a reasonable expectation that the visitor's desire for seclusion and freedom from trespass will be acknowledged and respected by the host and by others.

B. Society Does Not Recognize The Privacy Expectations Of Invitees Other Than Overnight Guests As Legitimate

The reasoning of *Olson* does not extend to a person who is present in the home or apartment of another simply as a temporary guest. Rather, a brief visitor to an apartment is more similarly situated to a person who is simply legitimately on premises—a relationship that is not sufficient to support invocation of the Fourth Amendment. Unlike the overnight guest, who may treat the dwelling as a substitute home, *Olson*, 495 U.S. at 99; cf. *Stoner*, *supra*, and who may otherwise exercise authority to exclude others from the place as if he were its owner or co-tenant, *Jones*, *supra*, mere visitors generally lack a privileged sense of privacy in another person's home. In contrast to

overnight guests, transient visitors ordinarily are not given a substantial "measure of control over the premises." *Olson*, 495 U.S. at 99. Nor do such visitors ordinarily treat the home as their substitute residence, relying on it to afford privacy for personal activities uniquely associated with the home. Because a temporary visitor may retreat to his own home for such personal activities, society does not generally share the understanding that, to protect the guest's privacy, the host will exclude others on the guest's behalf.

To the contrary, one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others. Instead, it is commonly accepted that hosts are free to admit or exclude others as they see fit. For example, one invited to a dinner party at another's home would hardly be surprised to find additional guests seated at the table, even though this would render the occasion substantially less private. Nor would one invited to the home for business be surprised to find others there as well. Consequently, the lower federal courts have concluded that social invitees and party guests have no reasonable expectation of privacy in another's home.[3] And the courts similarly have held that one who

---

[3] *United States* v. *Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (purely transient party guest had no reasonable expectation of privacy in his host's home); *United States* v. *McNeal*, 955 F.2d 1067, 1072-1073 (6th Cir. 1992) ("casual transient visitor" who stopped by to use the phone lacks legitimate expectation of privacy in home of another); *United States* v. *Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (one who is merely present, and does not stay overnight, in the hotel room of another lacks a legitimate expectation of privacy).

merely arrives to conduct an unlawful business transaction,[4] or uses another's home not as a refuge from society but as an open front for his illegal business operations, lacks a legitimate expectation of privacy there as well.[5]

This Court has likewise recognized limits on the expectations of privacy that society considers legitimate. The Court has held that passengers in another person's car cannot claim the protection of the Fourth Amendment to object to a search of the glove box or the area under the car's seat. *Rakas*, 477 U.S. at 148. It has held that a person who places "thousands of dollars worth of illegal drugs" in the purse of an acquaintance cannot claim a reasonable expectation of privacy in the purse, since the person lacks a "right to exclude other persons from access" to it. *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980). And it has held that merely participating in a joint venture to transport drugs does not give a co-conspirator the right to object to a search or seizure of another conspirator's vehicle used for that purpose, absent a recognized basis for asserting a privacy expectation

---

[4] *Terry* v. *Martin*, 120 F.3d 661, 663-664 (7th Cir. 1997) (where evidence showed only that defendant was visiting the premises for the purpose of an unlawful transaction—the purchase of heroin—defendant lacked reasonable expectation of privacy); *United States* v. *Wiley*, 847 F.2d 480, 481 (8th Cir. 1988) (cocaine dealer lacked reasonable expectation of privacy when making business visit to the home of a customer).

[5] *United States* v. *Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1992) (invited guest who used his host's apartment "as a base for his business operations"—the sale of crack cocaine—rather than as a "sanctuary from outsiders" lacked a reasonable expectation of privacy and was indistinguishable "from any other invited guest" who might have been there when the police showed up).

or property interest in the vehicle. *United States* v. *Padilla*, 508 U.S. 77 (1993) (per curiam). By the same token, temporary guests, even when engaged in a joint venture with the host, lack a legally or socially recognized right to exclude others—or to have the host exclude others on their behalf—in order to maintain their privacy in the host's dwelling. They therefore cannot rely on the Fourth Amendment to object to intrusions on the privacy of that place.

C. Respondents Were Mere Invitees With No Reasonable Expectation of Privacy In The Premises

In this case, respondents did not have a sufficient connection to the apartment to assert a legitimate expectation of privacy in it. Unlike the defendant in *Jones*, they did not exercise dominion and control over it. Unlike the defendant in *Olson*, they did not sleep overnight there or use the apartment as a substitute home, *i.e.*, a refuge for the conduct of intimate affairs uniquely associated with the home. As a result, there was no legal or general social understanding that they—mere "short-term business callers," J.A. C8—would have the right to exclude others, or that others would be excluded on their behalf, to preserve their privacy. To the contrary, consistent with general social understandings and societal expectations, the apartment's lessee, Ms. Thompson, could have admitted other guests during their brief presence and was in no way obliged to defer to their wishes regarding the exclusion of others.

The factors relied upon by the Minnesota Supreme Court—that respondents "had the leaseholder's permission to be inside the apartment," "remained inside the apartment for at least 2 1/2 hours," and spent their time inside the apartment "work[ing] in concert

with the leaseholder on [the] common task" of bagging cocaine, J.A. A17-A18, do not meaningfully distinguish this case from *Rakas*. In *Rakas*, as here, the defendants had the owner's permission to be on the premises; they had been there for "some time" (although the opinion does not reflect how long); and they were engaged in a common task with the car's owner—making a get-away from a clothing store robbery. 439 U.S. at 130. Consequently, just as the passengers lacked a legitimate expectation of privacy in *Rakas*, so too respondents lacked a legitimate expectation of privacy here.

To reach the opposite conclusion, the Minnesota Supreme Court did not look at shared social understandings but instead attempted to determine the degree to which society "value[d]" respondents' connection to the apartment. "[I]f [respondents'] ha[ve] established that [their] status is the type that serves functions recognized as valuable by society," the court explained, then "[their] expectation of privacy is legitimate." J.A. A16; see J.A. 18 ("If the relationship" between "the property possessor and the person alleging the privacy interest in the property" is "the type that society recognizes as valuable, then we will find standing."). Even highly valuable relationships between invitees and property owners, however, do not necessarily give rise to legitimate expectations of privacy. Repairmen may enter dwellings to preserve a home's physical integrity; piano teachers and tutors may educate the homeowner's children; appraisers may help protect the financial investment of the owner; and doctors may make housecalls to protect the occupant's health or life. None of those visitors, however, has an expectation of privacy in the home he is visiting.

In any event, the court assessed the "value" of the relationship in this case at so high a level of generality that its conclusions were incongruous. The specific use to which respondents put Ms. Thompson's apartment was as a site for "the task of bagging cocaine"—an activity that admittedly is one that "society does not recognize as valuable." J.A. A18; cf. *Padilla*, *supra* (co-conspirator in a drug transaction does not, simply by virtue of that relationship, acquire a protected Fourth Amendment interest in property used by the drug venture). But the court concluded that the relationship was valuable nonetheless by describing the relationship as an exercise of "the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." J.A. A18. An analysis on that high a level of generality loses sight of the touchstone of a protected privacy interest: a socially sanctioned expectation of an individual that he will not be disturbed. Because respondents lacked such a reasonable expectation, they cannot rely on the protections of the Fourth Amendment here.

II. UNAIDED OBSERVATION OF A DWELLING FROM A COMMON AREA OPEN TO THE PUBLIC IS NOT A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

Even if respondents had a protected privacy interest in the dwelling in which they were packaging drugs, the officer's observations of the dwelling did not constitute a "search" within the meaning of the Fourth Amendment. When an officer makes observations from a legitimate location—such as when the officer stands in an open field or common area—then

unaided observation from that vantage point cannot constitute a "search."

A. Unaided Observation From A Public Or Common Area Is Not A Search

1. Although constitutional protection against unreasonable intrusion is at its strongest in a person's home, *Oliver* v. *United States*, 466 U.S. 170, 178 (1984); *Payton* v. *New York*, 445 U.S. 573, 601 (1980), "[w]hat a person knowingly exposes to the public, even in his own home * * * is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Police officers ordinarily "may see what may be seen from a public vantage point" without triggering constitutional concerns. *Florida* v. *Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (internal quotation marks omitted); see *id.* at 454 (O'Connor, J., concurring). "[T]he home and its curtilage" thus "are not necessarily protected from inspection that involves no physical invasion." *Id.* at 449 (plurality opinion).

In *California* v. *Ciraolo*, 476 U.S. 207 (1986), this Court held that it was permissible for officers to use an airplane to fly over and view the backyard of a house where a high fence prevented ground level observation. The Court agreed that the yard in that case was entitled to the same constitutional protection as the home itself because it was within the "curtilage." See 476 U.S. at 213. But the Court nonetheless held that the overhead surveillance was not a search. The observations were made from public airspace, "in a physically nonintrusive manner," and any member of the public "who glanced down could have seen everything that these officers observed." *Id.* at 213-214.

> [Officers need not] shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

Id. at 213.

For almost identical reasons, the Court also has upheld warrantless, low-altitude helicopter observation of a greenhouse behind a defendant's mobile home. See *Riley*, 488 U.S. at 449-450 (plurality opinion) (although occupant "no doubt intended and expected that his greenhouse would not be open to public inspection," any "member of the public could legally have been flying over" the greenhouse and looked into it); see *id.* at 455 (O'Connor, J., concurring). As Justice O'Connor observed in her concurrence, now that public air travel is routine, it is unreasonable for homeowners to expect that their property will not be viewed from above. *Id.* at 453.

Just as police officers may make unaided observations from public airspace consistent with the Fourth Amendment, so too may they make similar observations from public areas at ground level. Indeed, they constitutionally may do so while trespassing on private property, so long as they make their observations from "open fields" and do not physically invade the curtilage of the home, *i.e.*, the area immediately surrounding the home "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 176, 180 & n.12; *United States* v. *Dunn*, 480 U.S. 294 (1987); *Hester* v. *United States*, 265 U.S. 57, 59 (1924) (Fourth

Amendment protection "is not extended to the open fields" whose distinction from "the house is as old as the common law.").

In *Dunn*, the officers entered the defendant's property, crossed several fences, and shined a flashlight into the window of the defendant's barn. 480 U.S. at 297-298, 304. Rejecting a Fourth Amendment challenge to the officers' conduct, this Court held that—even if one assumed that the defendant's barn, like his home, was constitutionally protected and "could not be entered * * * without a warrant," *id.* at 303—the officers' observations were not barred by the Fourth Amendment because they were made while "standing * * * in the open fields" and without crossing into the curtilage. *Id.* at 304. There is "no constitutional difference," the Court held, "between police observations [made from] a public place and [those made] while standing in open fields." *Ibid.*[6]

As a result, the Minnesota Supreme Court's assertion that the determinative issue is "not where the police officer was standing when he made his observation[;] * * * rather it is the area that was observed," J.A. A19-A20, is incorrect. *Ciraolo*, *Riley*, and *Dunn*

[6] Just as the alleged trespass was irrelevant in *Dunn*, 480 U.S. at 297-298, 304, so too is respondents' reliance on Minnesota's window-peeping statute. Resp. Br. in Opp. at 12 (citing Minn. Stat. 609.746 (1996)). The "concepts of privacy under the laws of each State" do not determine the extent of Fourth Amendment protection. *California* v. *Greenwood*, 486 U.S. 35, 44 (1988). In fact, the "interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

establish that, even where "the objects observed by the officers lay within an area that * * * was protected by the Fourth Amendment," the "Constitution d[oes] not forbid [the officers] to observe" those areas with their naked eyes so long as they make their observations from an area outside the curtilage where members of the public might reasonably do the same. *Dunn*, 480 U.S. at 304; see *Ciraolo*, 476 U.S. at 213-214 (naked eye observation of protected curtilage from non-intrusive aerial viewpoint constitutionally permissible); *Riley*, 488 U.S. at 451-52 (plurality opinion); *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) (critical question is "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that [the] expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable" (internal quotation marks omitted)).

2. In this case, Thielen observed the apartment from a grassy, common area that was not only open to "public * * * access" but also regularly approached by other tenants who would "leave the common sidewalk * * * to deposit [and store] their bicycles" nearby. J.A. E10; see J.A. E12 ("residents did walk upon and use the grassy area in front of Ms. Thompson's window"); J.A. E10 ("the public had access to the area directly in front of Ms. Thompson's windows to store bicycles"). There were no fences, trees, or bushes that might block public entry into the area where Thielen stood, or otherwise prevent public viewing through the window. J.A. E10; see J.A. I1-I7. Thus, the observations that Thielen made just as easily could have been made intentionally or inadvertently by any member of the public, such as another tenant parking a bicycle, a child chasing a

ball, a gardener pruning the bushes, or a curious passerby. Indeed, Thielen went to the apartment in the first place precisely because a member of the public had walked by the apartment, observed suspicious activity inside, and reported it to the police. J.A. A8, E2. There is nothing in the Fourth Amendment that bars law enforcement officers from making the same observations that any member of the public or other tenant of the building just as easily could have made. See *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 454 (O'Connor, J., concurring); cf. *California* v. *Greenwood*, 486 U.S. 35, 40 (1988) ("respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection" because the "garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public" (footnotes omitted)).

B. "Extraordinary Measures" To Reach A Public Place Do Not Convert Unaided Observation Into A Search

The Minnesota Supreme Court assumed that Thielen did not enter any area in which respondents had a protected Fourth Amendment interest—apartment or curtilage.[7] The court nonetheless held that

[7] The lower Minnesota courts found that the area where Officer Thielen stood was not curtilage, J.A. E12, D4, and the Minnesota Supreme Court declined to reach the issue, although it noted that the lower courts' conclusion was "plausible," J.A. A20 & n.10. This Court should not revisit that fact-intensive determination, which did not form the basis for the ruling below, J.A. A22. In any event, the lower Minnesota courts properly examined the four factors used to determine whether the area was curtilage, see *Dunn*, 480 U.S. at 301, and correctly concluded that it was not. Although the area was close to the apartment unit, it was not specifically identified with or associated with that unit; it was not enclosed; no one took any steps to obscure observation; and, perhaps most important of all, it was common to all tenants in the building (who stored their bicycles nearby) and open to the public at large. J.A. E10-E11; see pp. 25-26, *supra*. Federal courts have often found that common areas surrounding garden apartments do not harbor the "intimate activity" associated with the home, *Dunn*, 480 U.S. at 300, and thus are not curtilage. See *United States* v. *Cruz-Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (no expectation of privacy in condominium parking garage); *United States* v. *Fields*, 113 F.3d 313, 317, 321-322 (2d Cir.) (no Fourth Amendment violation where officers stood in fenced side yard of three-family apartment house and peered into apartment window through partly raised shade), cert. denied, 118 S. Ct. 434 (1997); *United States* v. *Acosta*, 965 F.2d 1248, 1252, 1255-1257 (3d Cir. 1992) (fenced backyard of apartment building not curtilage of apartment; resident had no reasonable expectation of privacy there or in apartment building hallway); *United States* v. *Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (no expectation of privacy in common areas of building); *United States* v. *Eisler*, 567 F.2d 814, 816 (8th Cir. 1978) (no expectation of privacy in hallway); *United States* v. *Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (no reasonable expectation of privacy in common area of high-security high-rise).

Thielen's unaided observations from a publicly accessible place constituted a search because he "took extraordinary measures to enable him to view the inside of the apartment." J.A. A22; see *ibid.* ("search" occurred because "the totality of [the officer's] acts" indicated that he took "extraordinary measures").

The court's "extraordinary measures" standard is flawed. To determine whether a search has taken place, courts must ask if the conduct "infringed" on "an expectation of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). When the officer's ultimate vantage point is one that a neighbor or another member

of the public might well have assumed, any expectation of privacy against being seen from that location is by definition unreasonable—even if it was difficult for a particular officer to acquire that vantage point. See, *e.g.*, *Ciraolo*, 476 U.S. at 213-214 (upholding police use of aerial observation not because it was less than an extraordinary effort but rather because the traveling public might have obtained the same view in airline flight); *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) (same). An officer might have to climb many flights of an outdoor fire escape on a public building to reach a rooftop garden that overlooks the backyard of a dwelling, but the degree of exertion would not convert his observations into a Fourth Amendment search.

Nor does it make a difference that Thielen intentionally positioned himself so that he could see inside. This Court repeatedly has rejected the claim that the officer's intent has anything to do with the legitimacy of an individual's expectation of privacy. See *Dunn*, 480 U.S. at 304-305 (because the observation was made from an unprotected area, it is constitutionally "irrelevant that the police observation at issue was directed specifically at the identification" of contraband inside a protected place); *Ciraolo*, 476 U.S. at 212 (rejecting respondent's challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of casual, accidental observation"). See also *Horton* v. *California*, 496 U.S. 128, 138, 140 (1990) (rejecting inadvertence requirement under "plain view" doctrine because "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective

state of mind of the officer" and because "no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent").

In any event, Thielen's "measures" can hardly be labeled extraordinary in comparison to the means upheld by this Court in the past—and characterizing such measures as "extraordinary" would create an unworkable standard for use by officers in the field. Thielen did not obtain an aircraft, hire a pilot, and fly over the dwelling to be able to see in. Contrast *Riley*, *supra*; *Ciraolo*, *supra*. Nor did he traverse acres of private property, cross fence after fence, and stand under the eaves while shining a flashlight into the structure. Contrast *Dunn*, 480 U.S. at 297-298, 304. Instead, Thielen at most crossed the grass in a common area of the apartment, stepped over or around low bushes, and—standing in an area that was open to "public * * * access" and often approached by other tenants for the purpose of storing their bicycles, J.A. E10—observed the inside of an apartment through gaps in the window blinds. J.A. A22. Even assuming that Officer Thielen crouched down to be able to see, J.A. A21, his actions were not extraordinary. The same observation still could have been made by a gardener clipping the bushes, by adults sitting in the grass, or by a shorter officer with no need to crouch. See *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion) (whether officer "'changed position,' and 'bent down at an angle so [he] could see what was inside'" the car, is "irrelevant to Fourth Amendment analysis;" because the "general public could peer into the interior * * * from any number of angles," there is no legitimate expectation of privacy in that which can be viewed from outside by "inquisitive passersby or diligent police officers."). Because Thielen stood

where any member of the public might have been, his observations transgressed no legitimate expectation of privacy and did not constitute a search.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General

MAY 1998